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State of New York Public Employment Relations Board Decisions from September 20, 2006

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 20, 2006

Keywords

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Comments

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TRANSPORT WORKERS UNION, LOCAL 106,
TRANSIT SUPERVISORS ORGANIZATION,**

Charging Party,

-and-

CASE NO. U-25419

**NEW YORK CITY TRANSIT AUTHORITY AND
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY AND SUBWAY
SURFACE SUPERVISORS ASSOCIATION,**

Respondents.

DAVIS & HERSH L.L.P. (LLOYD M. BERKO of counsel), for Charging Party

**MARTIN B. SCHNABEL, VICE-PRESIDENT AND GENERAL COUNSEL
(FRANCINE R. MENAKER of counsel), for Respondents New York City
Transit Authority and Manhattan and Bronx Surface Transit Operating
Authority**

**LAW OFFICES OF STUART SALLES (STUART SALLES of counsel), for
Respondent Subway Surface Supervisors Association**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Transport Workers Union, Local 106, Transit Supervisors Organization (TWU) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge. TWU's charge alleges that the New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA) (together, Authorities) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when the Authorities entered into a

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**GREATER ROCHESTER ADJUNCTS
DEDICATED TO EDUCATION,**

Petitioner,

-and-

CASE NO. C-5600

**COUNTY OF ONTARIO AND FINGER LAKES
COMMUNITY COLLEGE,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,


Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Greater Rochester Adjuncts Dedicated to Education has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

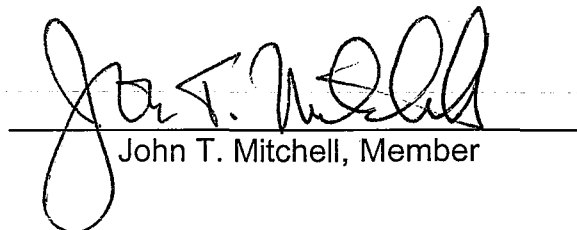
- Included: All adjunct instructors teaching credit bearing courses and paid by FLCC.
- Excluded: Administrators, all active members of any other bargaining unit representing College or County employees, all hourly employees, substitutes, and coaches coaching NJCAA team sports.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Greater Rochester Adjuncts Dedicated to Education. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

DRYDEN POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5601

VILLAGE OF DRYDEN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Dryden Police Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Full-time and part-time police officers.

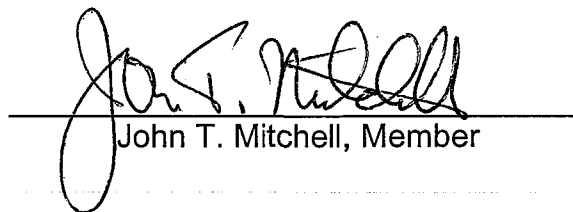
Excluded: Lieutenants, Sergeants, Officers/Internal Affairs and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Dryden Police Benevolent Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 8325,**

Petitioner,

-and-

CASE NO. C-5613

TOWN OF RICHMOND,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the International Union of Operating Engineers, Local 8325 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full and part-time employees of the Department of Public Works in the titles: MEO, MEO Light and Deputy Superintendent and all full and part-time employees in the Water Department in the title: Water Assistant.

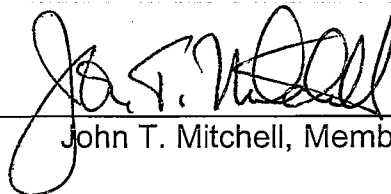
Excluded: Superintendent of the Department of Public Works, Superintendent of the Water Department, Assistant Superintendent of the Water Department, clericals, managerial.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 8325. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**UNITED ASSOCIATION OF WORKERS OF
AMERICA, LOCAL 528, NOITU-IUJAT,**

Petitioner,

-and-

CASE NO. C-5618

**FLORAL PARK-BELLEROSE UNION FREE
SCHOOL DISTRICT,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,


IT IS HEREBY CERTIFIED that the United Association of Workers of America, Local 528, NOITU-IUJAT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

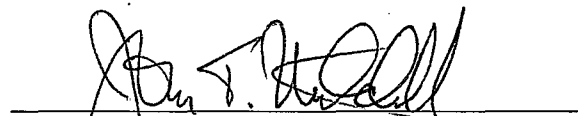
Included: All full-time and regular part-time Cooks, Food Service Workers and Cafeteria School Monitors.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Association of Workers of America, Local 528, NOITU-IUJAT. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 20, 2006
Albany, New York


Michael R. Cuevas, Chairman


John T. Mitchell, Member

collective bargaining agreement with the Subway Surface Supervisors Association (SSSA) that includes a parity clause. SSSA was charged by TWU with violating §§209-a.2(a) and (b) of the Act when it entered into the agreement with the Authorities.

The ALJ dismissed the charge finding that the collective bargaining agreement between the Authorities and SSSA did not contain a prohibited parity clause.

EXCEPTIONS

TWU excepts to the ALJ's decision, arguing that the ALJ erred by finding that the agreement entered into by Authorities and SSSA did not include a parity clause that negatively affected TWU's ability to negotiate on behalf of its unit members. The Authorities' response supports the ALJ's decision; SSSA has not filed a response.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.¹

TWU represents approximately 1000 employees in two units of level one Surface Transportation Supervisors (supervisors); one unit includes MaBSTOA employees and the other includes NYCTA employees. The employees in the MaBSTOA unit work primarily in Manhattan and the Bronx. The employees working for NYCTA are located primarily in Queens. The last collective bargaining agreement between MaBSTOA and TWU expired on November 15, 2003.

¹ 39 PERB ¶4554 (2006).

SSSA represents a unit of approximately 3000 level one supervisors employed by NYCTA primarily in Brooklyn and Staten Island.² At the end of 2003, the Authorities requested both unions to agree to bargain together for successor agreements, but both rejected joint bargaining. Separate negotiating sessions with each union were then scheduled. The negotiations with SSSA proceeded first.

The Authorities' stated position in bargaining with both units was to achieve surface consolidation and to pay for that right. In return for SSSA's agreement to consolidation, the Authorities agreed to two additional benefits: a salary increase of \$800 above the pattern and one extra leave day.

On July 15, 2004, SSSA and NYCTA entered into a successor collective bargaining agreement, with a term of November 1, 2003 to October 31, 2006. The collective bargaining agreement includes a surface consolidation agreement (hereafter, "Consolidation Agreement") that allows the Authorities to assign level one supervisors represented by the TWU to perform certain work that is exclusive to the SSSA unit supervisors under certain circumstances. Surface consolidation is also referred to by the parties as "commingling."

The Authorities sought the same agreement to commingling in the negotiations with TWU. In October 2005, the Authorities and TWU reached a verbal agreement on a successor agreement. The tentative agreement included provisions different from the SSSA collective bargaining agreement with respect to commingling and other provisions, similar to those in the SSSA agreement, which would raise the wages and benefits of TWU unit employees to the level of SSSA employees. When the verbal

² At a few locations, level one supervisors from the three units work side by side.

agreement was reduced to writing by the Authorities and forwarded to TWU, additional changes were requested by TWU, including substantive changes in the terms providing for commingling. When the parties failed to reach agreement on the additional revisions, TWU declared impasse.

Under the terms of the agreement between the Authorities and SSSA, the Authorities may assign a supervisor represented by TWU to perform duties that were previously considered exclusive bargaining work of SSSA, without contractual or Taylor Law issues being raised by SSSA, but the Authorities' right to do the same with TWU unit work has not been agreed upon by the Authorities and TWU.

DISCUSSION

The type of salary or wage parity proposals or agreements which have been previously considered [to be prohibited subjects of negotiations] have involved two or more units of employees of a single employer. The parity demands or contract provisions have typically involved ones in which a rate of pay or benefits negotiated by one union representing some of an employer's employees is subjected to an automatic increase should a second union representing other employees of the same employer obtain in subsequent negotiations with that employer a higher or better rate of pay or benefits than did the first union.³

While conceding in its exceptions that the Consolidation Agreement, as found by the ALJ, is not a common parity clause, TWU nonetheless characterizes the Consolidation Agreement as an "uncommon" prohibited parity provision that should be voided. TWU argues that the Authorities and SSSA have imposed a burden upon TWU to agree to the terms of the Consolidation Agreement because the Consolidation

³ *Plainedge Fed'n of Teachers*, 31 PERB ¶13015, at 3027 (1998).

Agreement has no effect unless both TWU and SSSA agree to its terms. TWU relies upon our decision in *Plainview-Old Bethpage Central School District*⁴, in which we held that:

A parity agreement is improper only to the extent that it trespasses upon the negotiation rights of a union that is not a party to the agreement. It does so by making it more difficult for the nonparty union to negotiate some benefits for employees it represents while imposing upon it a burden of negotiating for employees it does not represent.

The Consolidation Agreement entered into by SSSA and the Authorities imposes no such negotiating burden on TWU. The agreement sets forth certain contingencies that affect only employees in the SSSA unit. That the Authorities sought to strike the same, or a similar bargain, with TWU does not violate the Act. The Authorities did not condition negotiations upon TWU's acceptance of the Consolidation Agreement as written. Indeed, the Authorities and SSSA negotiated and orally agreed upon a separate and distinct agreement. It was only after negotiations broke down, once the tentative agreement was reduced to writing, that TWU even raised the parity issue.

While the SSSA's agreement with the Authorities to permit commingling may have put additional pressure on TWU to reach a similar agreement in order to obtain similar benefits, such pressure is not uncommon in collective bargaining,⁵ especially when the employer's employees are in separate units, represented by different employee organizations. "[A] negotiating relationship always includes myriad pressures which are specifically intended to cause a party to change its position on a matter

⁴ 17 PERB ¶3077, at 3119 (1984).

⁵ *Wappingers Congress of Teachers*, 27 PERB ¶3033 (1994).

involving some aspect of the employer-employee relationship. Labor negotiations under the Act are fundamentally all about pressure in one form or another.”⁶

As we noted in *Plainville-Old Bethpage, supra*, at 3119, citing *City of New London*, MPP-2268 (1973), decided by the Connecticut State Labor Relations Board:

What we find to be forbidden is an agreement between *one* group...and the employer that will impose equality for the future *upon another group*...that has had no part in making the agreement. We find that the *inevitable* tendency of such an agreement is to interfere with, restrain, and coerce the right of the later group to have untrammelled bargaining. [Emphasis in the original.]

The Consolidation Agreement does not impose any conditions upon TWU’s bargaining unit. It is a stand-alone agreement that can be implemented between the Authorities and SSSA, notwithstanding the failure or refusal of TWU to agree to the same or similar language. The employees represented by SSSA receive the benefits negotiated whether or not TWU agrees to the commingling sought by the Authorities and they receive no greater benefits if TWU agrees to commingle. TWU was free to negotiate variations to the Consolidation Agreement, which it apparently did, and was not bound to accept the Consolidation Agreement exactly as it was negotiated by the Authorities and SSSA.

We find that the Consolidation Agreement does not contain a prohibited or voidable parity provision, common or uncommon, and the Authorities and SSSA did not violate the Act by negotiating and agreeing to it.

Based on the foregoing, we deny TWU’s exceptions and affirm the decision of the ALJ.

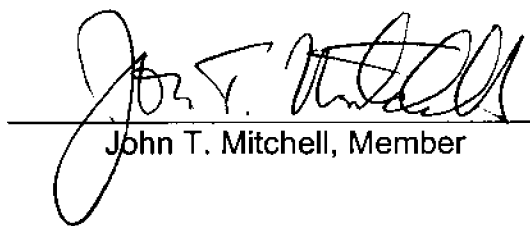
⁶ *Id.* at 3078.

IT IS, THEREFORE, ORDERED that the charge be, and hereby is, dismissed in its entirety.

DATED: September 20, 2006
Albany, New York

A handwritten signature in black ink, appearing to read "Michael R. Cuevas", written in a cursive style.

Michael R. Cuevas, Chairman

A handwritten signature in black ink, appearing to read "John T. Mitchell", written in a cursive style.

John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TEAMSTERS LOCAL 264A, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Charging Party,

CASE NO. U-26773

- and -

VILLAGE OF CATTARAUGUS,

Respondent.

**CREIGHTON, PEARCE, JOHNSEN & GIROUX
(E. JOSEPH GIROUX, JR. of counsel), for Charging Party**

**BOUVIER PARTNERSHIP, LLP (CHRIS G. TRAPP of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Teamsters Local 264A, International Brotherhood of Teamsters (Teamsters) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its improper practice charge which alleged, as amended, that the Village of Cattaraugus (Village) violated §§209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally ceased garbage collections and unilaterally changed a bargaining

unit employee's wages and benefits. The Director found that the charge and amendment were deficient and dismissed the charge in its entirety.

EXCEPTIONS

The Teamsters filed exceptions with the Board but failed to file proof of service of the exceptions upon the Village. Although advised of this failure and given the opportunity to submit to the Board proof of service of its exceptions upon the Village, the Teamsters failed to do so. The Village thereafter advised the Board that it had not received a copy of the exceptions from the Teamsters.¹

DISCUSSION

Section 213.2(a) of PERB's Rules of Procedure requires a party filing exceptions to also serve those exceptions on all other parties within the same fifteen working day period for the filing of exceptions and, in addition, to file proof of such service with the Board. The Teamsters exceptions were not served upon the Village within the requisite time period and no proof of service has been filed with the Board.

Timely service upon other parties is a component of timely filing and we will dismiss exceptions that have not been timely served.²


¹ In response to the Board's inquiry to the Teamsters, counsel for the Teamsters apparently thereafter forwarded a copy of the exceptions to the Village, indicating that he did not have proof that the exceptions had been earlier served by its then counsel upon the Village.

² *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶¶3037 (2002). See also *City of Albany v Newman*, 181 AD2d 953, 25 PERB ¶¶7002 (3d Dep't 1992).

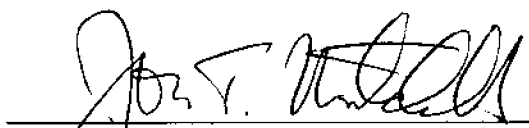
Based upon the foregoing, we do not reach the merits of the Teamsters' exceptions. The exceptions are therefore dismissed and the decision of the Director dismissing the improper practice charge is affirmed.

SO ORDERED.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**POLICE BENEVOLENT ASSOCIATION OF THE
NEW YORK STATE TROOPERS, INC.,**

Charging Party,

CASE NO. U-22830

- and -

STATE OF NEW YORK (DIVISION OF STATE POLICE),

Respondent.

**GLEASON, DUNN, WALSH & O'SHEA (MARK T. WALSH of counsel), for
Charging Party**

**WALTER J. PELLEGRINI GENERAL COUNSEL (MICHAEL N. VOLFORTE of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Police Benevolent Association of New York State Troopers, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge that alleged that the State of New York (Division of State Police) (State) violated §§209-a.1 (a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it denied a unit employee access to PBA representation during an investigatory interview concerning a "critical incident" which involved the employee.

EXCEPTIONS

The PBA excepts to the ALJ's decision, arguing that the ALJ erred by finding the subject-matter of the improper practice charge is a prohibited subject of negotiations.

The State filed a response which supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

PROCEDURAL MATTERS

In its charge, the PBA alleged that there was a unilateral change in procedures to be followed during the investigation of "critical incidents" when the State denied it access to an employee during an investigatory interview concerning a "critical incident" in which the employee had been involved. In his initial decision¹, the ALJ addressed the State's argument that the charge should be deferred to the parties' contractual grievance procedure because the PBA had filed a grievance and that no rights of unit employees protected by the Act had been affected by its actions. The ALJ determined that:

[I]f the charge had alleged a violation of §209-a.1(d) only, I would summarily defer the matter under *Herkimer County BOCES* [20 PERB ¶3050 (1987)]. Although the circumstances under which an employee must participate in an employer's investigation into his or her misconduct are mandatorily negotiable [citing *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶3041 (1997)], the fact that the PBA filed a grievance concerning the conduct at issue here suggests that it may have a reasonably arguable source of right under the collective bargaining agreement.

The ALJ went on to determine that:

¹ 35 PERB ¶4554, at 4670 (2002).

rights comparable to those under [*NLRB v Weingarten, Inc*, 420 US 251, 88 LRRM 2689 (1975) (hereafter, *Weingarten*)] are accorded to public employees under the Act.

In reaching that conclusion, I reject the proposition that, because representation has been afforded to employees under Civil Service Law §75, no such rights are available under the Act. The rights available under §75 concern rights and duties that are independent of those under the Act.

Here, the Administrative Manual reveals significant rights, duties and consequences that may flow from a critical incident interview. Minimally, I find that the employee involved in such an interview has a protected right to consult with, and to obtain the advice and counsel of the PBA regarding those matters before submitting to the interview, provided that the exercise of those rights does not unreasonably interfere with the State's ability to conduct its investigation. [Citations and footnotes omitted.]²

On an interlocutory appeal from the ALJ's ruling that the matter was not properly deferred, we found that:

... [T]he State argues that the parties' collective bargaining agreement contains language that sets forth all the PBA's rights to pre-interview and interview representation. That the contract may contain language that mirrors or is substantially similar to rights arguably guaranteed by the Act is not sufficient to warrant deferral of an independently alleged §209-a.1(a) violation. All the ALJ needed to do was determine whether the alleged §209-a.1(a) violation was purely derivative of the alleged §209-a.1(d) violation. Consequently, a determination on the applicability of *Weingarten* was not necessary as this is not an issue of first impression. That the Board had not yet decided whether the rights set forth in *Weingarten* are applicable to public employees under the Act was not dispositive of the deferral decision. There are a number of ALJ decisions that have held that *Weingarten* rights are guaranteed by §202 of the Act. Therefore, the improper practice charge set forth a

² *Id.*, at 4672.

cognizable violation of §209-a.1(a) of the Act. The ALJ's inquiry should have ended there.

We, therefore, reverse the ALJ's decision insofar as he found it necessary to analyze the applicability of *Weingarten*. We affirm his decision not to defer the improper practice charge to the parties' contractual grievance procedure. [Citations and footnotes omitted.]³

On remand, the PBA withdrew both the §§209-a.1(a) and (c) allegations and sought a decision as to the §209-a.1(d) allegation only, arguing that the arbitration award did not address whether the State's promulgation of a new "critical incident" policy breached the parties' collective bargaining agreement. The State supported deferral, arguing that the arbitrator had addressed the critical incident policy and the alleged changes thereto.

The ALJ found that the charge could not be appropriately deferred because, although there were contractual provisions dealing with the unit employees' rights to seek access to a PBA representative during an investigatory interview, such provisions provided the PBA with no enforceable contractual rights because the contractual provisions dealt with a prohibited subject of negotiations.⁴ The ALJ dismissed the improper practice charge because he found that the subject matter of the charge was, as to these parties, a prohibited subject of negotiations.⁵ The State would, therefore,

³ 35 PERB ¶¶3031, at 3087 (2002).

⁴ 39 PERB ¶¶4547 (2006).

⁵ *State of New York (Div of State Police)*, 38 PERB ¶¶3007 (2005), *petition for review pending*.

have had no obligation to negotiate with the PBA any changes in the critical incident policy, because it deals with matters of employee discipline.

FACTS

The facts are fully set forth in the ALJ's initial decision⁶ and are repeated here only as necessary to address the exceptions.

The charge alleges that a unit employee was involved in a motor vehicle accident that resulted in the death of the driver of the other vehicle. After the accident, while the unit employee was being treated for injuries, both PBA representatives and a representative of the Critical Incident Investigation Team were present to speak to the employee about the incident. The PBA representatives attempted to speak with the employee but were denied access to him by the State's representative, unless the conversations were conducted in the presence of the Critical Incident Investigation Team. In addition, it is alleged that a PBA representative was advised that he could be present during the "critical incident" interview, but that he could not participate in any way. The PBA filed a grievance concerning the denial of access to the employee, relying on the access rights under the Administrative Manual.⁷ It also filed the instant improper practice charge.

⁶ *Supra*, at note 1.

⁷ As defined in Article 9H1 of the New York State Police Administrative Manual, a "critical incident" includes: "Any action by a Member that results in a serious physical injury or death to another person or the Member." The Administrative Manual sets forth a variety of rights and duties associated with administrative investigations. The Manual

The arbitrator held that the State did not breach the collective bargaining agreement⁸, because the employee was not denied representation in an investigation that could result in disciplinary charges, as the employee was not a potential target for discipline.

DISCUSSION

In *State of New York (Division of State Police)*⁹, we held that disciplinary procedures for New York State Police are prohibited subjects of negotiations. While that decision is on appeal and the PBA urges us to reconsider our decision therein and find disciplinary matters involving the State Police to be mandatory subjects of negotiations, we decline to do so. We here incorporate and adopt the rationale in that decision for the conclusion that discipline, as it relates to the State Police, is a prohibited subject of negotiations.¹⁰ As the alleged unilateral change in the “critical incident” policy deals with

also provides rights concerning access to union representation during administrative investigations.

⁸Article 16.2(D)(8) of the agreement states: In all cases wherein a member is to be interrogated concerning an alleged violation of the Division Rules and Regulations, which, if proven, may result in the member's dismissal from the service or the infliction of other disciplinary punishment upon the member, the member shall be afforded a reasonable opportunity and facilities to contact and consult privately with an attorney of the member's own choosing and/or a PBA troop representative before being interrogated.

⁹ *Supra*, note 5.

¹⁰ See also *Patrolmen's Benevolent Assn of the City of New York v New York State Pub Empl Relations Bd*, 6 NY3d 563, 39 PERB ¶7006 (2006).


a prohibited subject of negotiations, the State has no obligation to negotiate the subject; indeed, the State may not negotiate a prohibited subject with the PBA.¹¹

To the extent that the PBA attempts to argue in its exceptions that the “changes” in the critical incident policy implicate employees’ performance and are thus mandatorily negotiable, the State correctly points out that the argument is being made for the first time in the PBA’s exceptions. As a result, the argument is not reviewable by the Board.¹²

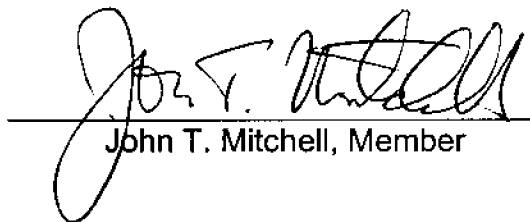
Based upon the foregoing, we deny the PBA’s exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the charge must be and hereby is dismissed in its entirety.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹¹ See *Board of Educ of the City Sch Dist of the City of New York v New York State Pub Empl Relations Bd*, 75 NY2d 660, 23 PERB ¶7012 (1990).

¹² See *Subway-Surface Supervisors Assn and New York City Transit Authority (Sayad)*, 28 PERB ¶13070 (1995).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**MONROE BOCES #1 PARAEDUCATORS
ASSOCIATION, NYSUT, AFT, AFL-CIO,**

Petitioner,

CASE NO. CP-1018

- and -

MONROE #1 BOCES,

Employer.

SHELLY D. CLEMENTS for Petitioner

**HARRIS BEACH PLLC (EDWARD A. TREVVETT of counsel) for
Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Monroe #1 BOCES (BOCES) to a decision of an Administrative Law Judge (ALJ), dismissing the unit clarification portion of a petition filed by the Monroe #1 BOCES Paraeducators Association (BPA) and granting the unit placement portion of the petition. The ALJ placed the titles of Signing Skills Coach, American Sign Language (ASL) Teacher Assistant, and Notetaker employed by BOCES in the BPA bargaining unit.

The ALJ found that the Signing Skills Coaches, ALS Teacher Assistants, and Notetakers shared a greater community of interest with the unit represented by BPA than

with the non-instructional employees in the Monroe #1 BOCES Professional Support Personnel Association (PSP) unit, the unit placement determination sought by BOCES.¹

EXCEPTIONS

BOCES excepts to the ALJ's decision on both the law and the facts. BPA filed a response in support of the ALJ's decision.

Based upon a review of the record and consideration of the parties' contentions, we affirm the decision of the ALJ.

FACTS

We adopt the ALJ's findings of fact², together with additional facts relevant to the exceptions filed by the BOCES.

Employees of BOCES are represented in three different bargaining units: the BOCES United Professionals (BUP), which represents only employees who are required to be licensed or certified; the petitioning BPA, which represents only full-time and part-time Paraeducators, Master Paraeducators, and ABA Skill Coaches; and the PSP, which includes clerical and technical titles.

Signing Skills Coaches, Notetakers, and ASL Teacher Assistants are all part of the BOCES Deaf Education ASL Department. Signing Skills Coaches are supervised by the coordinator of the department or her assistant. Notetakers and ASL Teacher Assistants are supervised by the coordinator's assistant.

¹ PSP expressed no interest in representing the in-issue titles.

² 39 PERB ¶4011 (2006).

Signing Skills Coaches are assigned to individual students to interpret what the teacher is saying. They then modify the instructional information to fit the sign vocabulary of the student in an effort to facilitate the student's involvement in the classroom. The Signing Skills Coach is also responsible for expanding the student's sign vocabulary. They typically have an Associates Degree in Interpreting, have taken formal sign instruction, and have achieved an intermediate to advanced level of signing fluency.

A Signing Skills Coach works with the classroom teacher and speech pathologist to develop strategies to enhance the student's educational experience. They attend Individual Education Program meetings as part of their student's support team. Signing Skills Coaches spend approximately 95 percent of their time working directly with students. Signing Skills Coaches perform several of the typical work activities listed for the title of Teachers Aide, and one function, exam proctoring, included in the job description for School Aide title. The Teachers Aide duties that the Signing Skills Coaches perform include assisting teachers with academic assignments, supervising students in and outside the classroom, assisting students with their daily living activities, and correcting papers.

Some Notetakers work with the visually impaired or severely handicapped students; in these cases, one-on-one work with the student is necessary. However, the majority of Notetakers work with students who are hearing impaired and, in that situation, they sit unobtrusively in the back of the classroom and take notes for their assigned student, without actually having direct interaction with the student. Notetakers perform some of the duties set forth in the description for Teachers Aide, such as helping students in the classroom with academic activities. The only School Aide duty they perform is

proctoring exams, which is also a duty of the title Teachers Aide. Notetakers are required to have a high school diploma and legible handwriting.

ASL Teacher Assistants work in the classroom with ASL Teachers who are deaf. They help the teachers communicate with students and make the teacher aware if students are speaking, if they are saying inappropriate things, or if a student has a question. They monitor the behavior of the students during the ASL lesson and work directly with students when they break into groups.

ASL Teacher Assistants spend 85 percent of their time working directly with students, and the remaining 15 percent of their time in the classroom assisting the ALS Teacher as necessary. Additionally, the ASL Teacher Assistant can serve as a short-term substitute for the ALS Teacher. The Teachers Aide duties that the ALS Teacher Assistants perform include: assisting students with classroom assignments, supervising students in the classroom, assisting students with projects, correcting papers, performing simple and routine clerical duties, and maintaining inventory and a schedule of repairs for classroom equipment. They only perform three of the duties listed for School Aides: perform routine clerical tasks, assistance in libraries, and reparation of bulletin boards.

Some BPA unit members work one-on-one with students in a classroom setting, while others tend to the physical needs of students who are either wheelchair bound or have some other handicapping condition requiring direct person care. In a classroom there may be several BPA unit members in addition to a Signing Skills Coach and the teacher. Currently, there is only one PSP unit employee who works directly with children, the Audiometric Technician. Some PSP unit members work with students teaching them

basic office skills as part of a work study program for which the students are paid, but this is not an essential function of their position.

ASL Teacher Assistants and Signing Skills Coaches are salaried while Notetakers, PSP unit employees, and Paraeducators are paid hourly. Only Paraeducators receive a salary differential when substituting for certified staff. All three at-issue positions, Paraeducators, and PSP unit members receive 15 sick days per year. PSP unit employees and Paraeducators can bank up to 60 days of sick leave, while the petitioned for positions cannot bank their sick leave.

Employees in the at-issue titles, employees in the BPA unit, and employees in the PSP unit all receive two personal days. All contribute ten percent to their health insurance premiums. All employees have the same dental and life insurance coverage and all received a four percent increase in salary for the 2005-2006 school year. The petitioned for positions do not receive longevity payments, while PSP employees and Paraeducators do.

PSP unit employees work eight hours per day for a 10, 11, or 12-month year. The petitioned for positions and Paraeducators work a 10-month year for varying hours of less than 8 hours per day.

The Civil Service title that attaches to the internal titles of Signing Skills Coach, Notetaker, and ASL Teacher Assistant, is School Aide. School Aide is a title contained in the recognition clause of the collective bargaining agreement covering employees in the PSP bargaining unit. The Civil Service job description for School Aide provides that the focus of the position is on clerical and monitoring tasks, rather than assisting teachers

with classroom-related activities. There are no educational or experience qualifications for the position of School Aide.

DISCUSSION

A unit clarification petition seeks a factual determination that the at-issue positions are already encompassed within the petitioner's bargaining unit.³ The unit clarification petition is dismissed as it is apparent that the titles of Notetaker, Signing Skills Coach, and ASL Teacher Assistant are not already included within the BPA bargaining unit.

BOCES argues that contrary to the ALJ's decision, the BOCES never took the position that the at-issue positions were already a part of the PSP unit. Although the at-issue positions were classified under the Civil Service title of School Aide, a title represented by the PSP, their duties are not akin to those of a School Aide. However, because the ALJ decided that the at-issue positions were not already being represented by the PSP unit and BOCES concedes that that determination was correct, we do not reach that exception.

BOCES also argues that the ALJ erred in characterizing its position with respect to community of interest. As we must make the community of interest determination in deciding the most appropriate unit placement of the at-issue titles, the ALJ's characterization is immaterial to our determination. The community of interest standard requires that a position be placed in the unit with which it has the greatest community of interest.⁴

³ *Monroe-Woodbury Cent Sch Dist*, 33 PERB ¶3007 (2000).

⁴ Civil Service Law §207(1).

Community of interest can be established through the finding of shared terms and conditions of employment, work location, educational requirements, shared mission, and common supervision.⁵ The ALJ was correct in finding that the at-issue positions have a greater community interest with the members of the BPA bargaining unit than with the members of the PSP bargaining unit. Although the three titles fall under the Civil Service title of School Aide, their duties are more akin to those of a Paraeducator.⁶ We have held that if employees share the same duties, they belong in the same unit.⁷ Much like the BPA unit members, employees in the at-issue titles engage in hands-on, student interactive learning.⁸ Employees in these titles exercise general supervision over students and receive direct supervision from a teacher or administrator, both of which are characteristics of a Paraeducator position rather than a School Aide position.⁹ The only member of the PSP unit that interacts with the students' learning is the Audiometric Technician; all other titles in this unit are clerical and technical.¹⁰

BOCES also contends that the conclusion reached by the ALJ that the job duties of the at-issue positions "... are closely aligned with BPA unit members, as both groups work in classroom setting directly with students and assist teachers to facilitate the education mission of BOCES and the component districts to which they are assigned," is

⁵ *New York City Transit Auth*, 36 PERB ¶3038 (2003).

⁶ ALJ Exhibit 1C.

⁷ *City of Niagara Falls*, 13 PERB ¶3017 (1979).

⁸ Transcript, p 153.

⁹ ALJ Exhibit 1C.

¹⁰ Transcript, pp 144-145.

not supported by the record and is inaccurate. The ALJ's statement is based on record evidence which we find persuasive. The at-issue titles are closely associated with BPA unit members, as both groups work in a classroom setting directly with students and aid teachers in facilitating the educational mission of BOCES. ASL Teacher Assistants, Signing Skills Coaches, and Notetakers also share a common professional mission and work environment with Paraeducators; work in classroom settings and directly service students in furthering their education and social needs,¹¹ and work side by side with Paraeducators in classrooms and other academic settings.¹²

The at-issue positions have essentially the same working environment, benefits, workday and work week as BPA unit members and receive a comparable, if not identical, level of salary and benefits. ASL Teacher Assistants, Signing Skills Coaches, and Notetakers work a 10-month school year, a seven hour day, and receive the same number of personal and sick days as Paraeducators.¹³ Additionally, employees in the at-issue titles and BPA members do not receive vacation days, while employees in the PSP unit do.¹⁴

BOCES asserts that the line of supervision of the at-issue positions are much closer to those of the employees in the PSP unit than to those in the BPA unit. All the programs in the BOCES program are run by departments; BPA unit members and each at-issue position are evaluated by the administrator in charge of their program. Although

¹¹ Transcript, pp 65-66, 86.

¹² Transcript, pp 115-118.

¹³ Transcript, pp 150, 169, 182-183.

¹⁴ BOCES' Exhibit 1-2.

BOCES is correct in stating that the line of supervision is a factor to be weighed in determining the community of interest, even if we were to find that there is not a common line of supervision, that would not be enough to overcome the other factors that indicate a strong community of interest between the BPA unit employees and the at-issue positions. The factors relied upon by the ALJ - a common work environment, similarity of work duties, wages, benefits, and educational requirements and a shared mission - can not be outweighed by the lack of a common line of supervision.

BOCES asserts the ALJ failed to give ample weight to the its uniting preference. BOCES argues the at-issue positions of Signing Skills Coaches, ALS Teacher Assistants, and Notetakers share no stronger a tie to the BPA unit than they do to the PSP unit.

BOCES correctly asserts that the community of interest of the titles sought to be placed and the employer's administrative convenience are matters that must be considered.¹⁵ However, while considering the the public interest standard, the Board has emphasized that the community of interest created by similar terms and conditions of employment is still the most important criteria when deciding unit placement.¹⁶ Here, we find that the at-issue titles share a greater community of interest with the BPA bargaining unit than the PSP bargaining unit.

¹⁵ *Rye City Sch Dist*, 33 PERB ¶¶3053, at 3145 (2000).

¹⁶ *County of Sullivan*, 7 PERB ¶¶3069 (1974), *confirmed sub nom, Bivins v Helsby*, 55 AD2d 230, 9 PERB ¶¶7029 (3d Dept 1976).

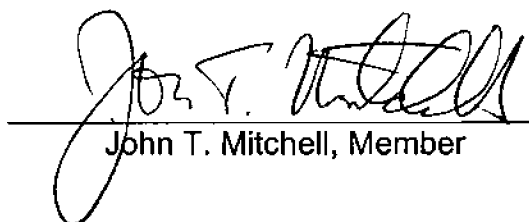
For the above stated reasons, the placement petition is granted and the titles Notetaker, Signing Skills Coach and ASL Teacher Assistant are hereby placed into the BPA's unit.¹⁷

SO ORDERED.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹⁷Placement of 32 employees in the BPA's unit of 337 employees does not affect its majority status. See *New York Convention Ctr. Operating Corp.*, 27 PERB ¶3034 (1994).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TEAMSTERS LOCAL 338, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Petitioner,

-and-

CASE NO. C-5611

TOWN OF KORTRIGHT,

Employer,

-and-

AMALGAMATED INDUSTRIAL UNION LOCAL 76B,

Incumbent/Intervenor.

**COHEN, WEISS AND SIMON LLP (MANLIO DI PRETA of counsel), for
Petitioner**

**KENNEDY, JENNIK & MURRAY, PC (ELIZABETH M. PILECKI of counsel),
for Incumbent/Intervenor**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Teamsters, Local 338, International Brotherhood of Teamsters (Teamsters) to a decision of the Director of Public Employment Practices and Representation (Director). In Case No. C-5611, the Director dismissed the Teamsters' petition to represent a unit of employees of the Town of

Kortright (Town) who are currently represented by the Amalgamated Industrial Union Local 76B (Local 76B).¹

The Director dismissed the petition finding that the Teamsters failed to comply with PERB's Rules of Procedure (Rules).

EXCEPTIONS

The Teamsters excepts to the Director's decision, arguing that the directions for filing the petition on the official printed form petition were ambiguous, that it substantially complied with the Rules, and that PERB was on notice of its intention to decertify Local 76B. Local 76B's response supports the Director's decision; the Town has not filed a response.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director.

FACTS

On May 31, 2006, the Teamsters filed a petition seeking to represent a unit of Town highway employees². A letter dated June 7, 2006, notified the Teamsters that its

¹ In Case No. C-5612, the Director deemed the petition of Burton Pickett, Jr., which sought to deprive Local 76B of representation status for the unit of Town employees, withdrawn for failure to respond to the Director's deficiency notice. While the Teamsters' president wrote to the Director on June 22, 2006, in response to the Director's deficiency notices dated June 7, 2006, to the Teamsters in Case No. C-5611, and to Pickett, in Case No. C-5612, neither the Teamsters nor anyone else filed a notice of appearance or other authorization to represent Pickett in Case No. C-5612. The Director, therefore, properly disregarded the Teamsters' letter of June 22, 2006 with respect to Case No. C-5612. There being no objection to the Director's determination to deem the case withdrawn, no application to reopen or any motion to consolidate the two cases on exceptions to the Board, Case No. C-5612 remains administratively closed and is not properly before us. Since none of the exceptions deal with the Director's closing of this case, the exceptions that pertain to Case No. C-5612 will, therefore, be disregarded.

petition would be dismissed if not voluntarily withdrawn because the petition was not accompanied by the showing of interest and declaration of authenticity required by §201.4 of the Rules and did not identify the petition as one for decertification. By a fax transmittal, the Teamsters submitted a letter dated June 14, 2006, together with copies of the signed authorization for representation cards from the Town highway employees and a copy of the letter sent by said employees to Local 76B, advising that the employees did not wish to be represented by Local 76B. By a decision dated June 28, 2006, the Director dismissed the Teamsters' petition.

DISCUSSION

Section 201.4 (a) of PERB's Rules clearly and unequivocally states, "Proof of showing of interest shall be filed simultaneously with a petition" Also clear is §201.4(d) of the Rules, which requires that " [a] declaration of authenticity, signed and sworn to before any person authorized to administer oaths shall be filed by the petitioner or movant with the director simultaneously with the filing of the showing of interest...." Rules, §201.5(b), lists the required contents of a petition for decertification.

While it is undisputed that the Teamsters failed to file proof of a showing of interest or a declaration of authenticity simultaneously with its petition, the Teamsters argues that it substantially complied with the Rules by submitting to the Director on June 14, 2006, copies of signed authorization cards and a copy of a letter from the Town

² The Town's collective bargaining agreement with Local 76B expires on December 31, 2006. A petition for decertification had to be filed during the month of May 2006 to be timely [Rules §201.3(d)].

employees to Local 76B in place of a declaration of authenticity.³ In support of its position, the Teamsters cites to *Town of Amherst*, 13 PERB ¶3074 (1980) (hereafter, *Amherst*).

In *Amherst*, while the petitioner did not submit a declaration of authenticity, it did submit a showing of interest in which each page was countersigned by a unit member and each page contained the signature of a notary public, indicating that the signatures were obtained in the presence of the notary. Clearly, *Amherst* can be distinguished on the facts. Here, no showing of interest was submitted with the petition and no substitute for the declaration of authenticity was timely filed.

More importantly, since *Amherst*, we have reiterated on several occasions that our Rules regarding the showing of interest will be strictly applied.⁴ We have also consistently held that a petition for certification or decertification that is not accompanied by a showing of interest must be dismissed and a later, untimely, attempt to supply the missing showing of interest will not revive the petition.⁵

The Teamsters' argument that the language of the official form petition is unclear is equally unavailing. Our Rules are abundantly specific and clear.⁶ Those Rules, like

³ The Teamsters further argues that we should consider the petition in Case No. C-5612 as notice that the petition in Case No. C-5611 was intended to be a petition for decertification.

⁴ *Shenendehowa Cent Sch Dist*, 32 PERB ¶3020 (2003); *County of Broome*, 32 PERB ¶3054 (1999); *City of Binghamton*, 36 PERB ¶3055 (1999); *Jamesville-Dewitt Cent Sch Dist*, 31 PERB ¶3049 (1998).

⁵ *Jamesville-Dewitt*, *supra*; *New York City Convention Center Operating Authority*, 20 PERB ¶3063 (1987); *City Sch Dist of the City of Schenectady*, 20 PERB ¶3008 (1987).

⁶ See for example, Rules, §201.4

the form the Teamsters downloaded, are available on our website:

www.perb.state.ny.us. That a party may be inexperienced in practice before PERB and unfamiliar with our procedures is not a basis to accept a fatally defective petition or an untimely amendment thereto.⁷

Even were we to consider the petition in Case No. C-5612 as evidence that the Teamsters sought to decertify Local 76B, the Teamsters' petition would still be dismissed for failing to simultaneously file a showing of interest and declaration of authenticity in accordance with the case authority cited above.

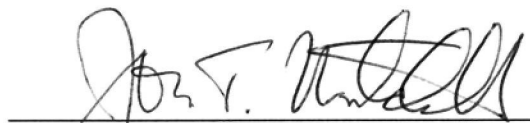
Based on the foregoing, we deny the Teamsters' exceptions and affirm the decision of the Director dismissing the petition.

IT IS, THEREFORE, ORDERED that the petition be, and hereby is, dismissed in its entirety.

DATED: September 20, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

⁷ *Jamesville-Dewitt, supra.*